



DEPARTMENT OF JUSTICE
CRIMINAL JUSTICE DIVISION

DATE: February 8, 2013

TO: Darin E. Tweedt, Chief Counsel

FROM: Bumjoon Park, Senior Assistant Attorney General
Shannon M. Kmetic, Senior Assistant Attorney General

SUBJECT: Declination Memorandum Regarding DOC/OCE

I. SUMMARY

On October 8, 2012, the Criminal Justice Division opened an investigation into allegations of misconduct occurring in the Director's Office of the Oregon Department of Corrections (DOC). Special Agents (SA) Jodi Shimanek, Micah Persons, Kim Hyde and Robert Culley and Senior Assistant Attorneys General (Sr. AAG) Bumjoon Park and Shannon Kmetic were assigned to the case. After conducting a thorough investigation, DOJ did not find sufficient evidence to prove criminal misconduct beyond a reasonable doubt. This memorandum summarizes the allegations, the investigation, and the analysis.

The allegations were made by longtime Oregon Corrections Enterprises (OCE) Administrator Robert Killgore. Killgore provided DOJ with a three ring binder he had prepared with spreadsheets documenting expenditure requests made by DOC which Killgore questioned. Killgore also provided some e-mail correspondence regarding expenditures, hiring of personnel and other requests. Killgore was interviewed several times during our investigation. Killgore alleged that the Director's Office of DOC had misused OCE funds over the last 10 years. Killgore alleged, in substance:

- DOC abused its power over OCE by asking OCE to pay for a number of "goodwill gestures" and improper personnel expenditures for the benefit of DOC.
- These "goodwill gestures" and personnel expenditures had cost OCE approximately \$5 million since 2002.
- The primary justification for the "goodwill" gestures was viewed as sales and marketing of OCE programs within DOC. DOC has received virtually all of OCE's marketing over the years although DOC makes up only approximately 20% of OCE's business according to Killgore.
- OCE's management was afraid to deny requests from DOC out of fear of retaliation from the DOC Director's Office.
- Over the years the Director's Office of DOC has allowed a culture in which DOC used OCE to make expenditures not allowed by the DOC budget.

- DOC Deputy Director Mitch Morrow recommended his son, Zak Morrow, be hired for an OCE position. Killgore indicated he was afraid there would be retaliation if Zak Morrow was not hired. Killgore also alleged there was preferential treatment of Zak Morrow after he was hired by OCE.
- DOC management received personal recognition within DOC for items paid for by OCE.

II. THE TWO INSTITUTIONS AT ISSUE

A. OREGON DEPARTMENT OF CORRECTIONS

Oregon Department of Corrections (DOC) is the prison system for the State of Oregon. DOC manages 14 state prisons throughout Oregon and houses over 14,000 inmates who have been convicted of felonies and sentenced to serve at least a year in the penitentiary. According to the Oregon Constitution, all inmates at the DOC must work. Article 1, Section 41 of the Oregon Constitution states two principles: (1) Whereas the people of the state of Oregon find and declare that inmates who are confined in corrections institutions should work as hard as the taxpayers who provide for their upkeep; and whereas the people also find and declare that inmates confined within corrections institutions must be fully engaged in productive activity if they are to successfully re-enter society with practical skills and a viable work ethic.

Article 1, Section 41 gives the Director of DOC great discretion to create inmate work programs and employment rules.¹ Inmate work programs are not subject to regular labor laws because the rules are set at the discretion of the Director.² Income from inmate work programs can only be used for furthering prison work programs.³ The DOC Director has virtually unlimited discretion to use the income from the inmate work programs to further prison work programs.

B. OREGON CORRECTIONS ENTERPRISES

Oregon Corrections Enterprises (OCE) is a quasi-state agency created by statute that uses prisoners to produce products such as furniture, garments and embroidery, road signs, and structures in parks. OCE inmate labor also provides laundry services, call-center services

¹ **Section (2) of Article 1, Section 41.** All inmates of state corrections institutions shall be actively engaged full time in work or on-the-job training. The work or on-the-job training programs shall be established and overseen by the corrections director, who shall ensure that such programs are cost-effective and are designed to develop motivation, work capabilities and cooperation.

² **Section (7) of Article 1, Section 41.** The corrections director may (a) install and equip plants in any state corrections institution, or any other location, for the employment or training of any of the inmates therein; or (b) purchase, acquire, install, maintain and operate materials, machinery and appliances necessary to the conduct and operation of such plants.

³ **Section (9) of Article 1, Section 41.** All income generated from prison work programs shall be kept separate from general fund accounts and shall only be used for *implementing, maintaining and developing* prison work programs...The state programs shall be run in a businesslike fashion and shall be subject to regulation by the corrections director. (Emphasis added.)

printing, mail fulfillment, and document scanning. OCE sells these products and services to a variety of customers, including private entities and government agencies.

Income generated by OCE can only be used to *implement, maintain, and develop* prison work programs.⁴ The head of OCE is called the Administrator. OCE's Administrator is hired by the DOC Director and works "at the pleasure of the Director of the Department of Corrections"⁵ The OCE Administrator has broad statutory discretion to do whatever promotes the public welfare of Oregonians.⁶ However, these broad powers are always subject to limitations on the authority of the Director.⁷

The OCE Administrator has broad discretion to enter into contracts or agreements in order to market the products or services of OCE.⁸ This can be with both private and public entities.⁹ There is an advisory board for OCE, but there is no oversight entity that monitors OCE activities. The advisory board has no authority or oversight powers of any kind over OCE.¹⁰ All of OCE's businesses are located within DOC institutions. DOC cannot receive any of the profits of OCE's business. Robert Killgore, OCE's Administrator, estimates that DOC makes up about 20% of OCE's business. OCE's ability to operate and function daily is dependent on DOC due to the fact that DOC provides the workforce, security, and locations for OCE.

⁴ Oregon Constitution Article 1, Section 41, Section 9.

⁵ "There is established Oregon Corrections Enterprises, a semi-independent agency. The Director of the Department of Corrections shall assign or appoint an administrator who shall serve at the pleasure of the director." ORS 421.344.

⁶ "Oregon Corrections Enterprises shall carry out the public purposes and missions stated in section 41, Article 1 of the Oregon Constitution, and in this section in the manner that, in the determination of OCE, best promotes the public welfare of the people of the State of Oregon." ORS 421.354 (4).

⁷ "*Subject to the authority of the director*, OCE may authorize, create, eliminate, establish, operate, reorganize, reduce or expand any program, system, facility or other unit of operation in furthering the missions of OCE." ORS 421.305 (1)(L) (Emphasis added).

⁸ Subject to the authority of the Director of the Department of Corrections over care, custody and control of inmates and of corrections institutions, in carrying out the powers and duties generally described by ORS 421.354, Oregon Corrections Enterprises may: "(1)(c) Make any and all contracts or agreements, enter into any partnerships, joint ventures or other business arrangements, create and participate fully in the operation of any business structure, including but not limited to the development of business structures for inmate work program systems and networks with any public, private, government, non-profit or for profit person or entity that *in the judgment of Oregon Corrections Enterprises is necessary or appropriate to accomplish the marketing of products or services produced by inmates or the production of goods, ware or services by inmates.*" ORS 421.305(1)(c) (Emphasis added).

⁹ "Oregon Corrections Enterprises may enter into contracts or agreements with private persons or government agencies for the purpose of: (a) Accomplishing the production and marketing of products or services produced or performed by inmates." ORS 421.354(2).

¹⁰ "The administrator of Oregon Corrections Enterprises shall establish, by the issuance of a policy directive or order, an advisory council consisting of not fewer than three members to provide policy input concerning Oregon Corrections Enterprises operations and its discharge of the functions and duties prescribed by section 41, Article 1 of the Oregon Constitution." ORS 421.347(1).

III. KILLGORE'S ALLEGATIONS

Our investigation determined that Killgore's allegations fell into four general categories of transactions between DOC and OCE. The categories are: (1) infrastructure and security improvements to DOC facilities;¹¹ (2) supplies for DOC;¹² (3) donations and goodwill gestures from OCE to DOC and (4) additional personnel costs incurred by OCE at DOC's request. Following are more specific examples of the four categories of Killgore's allegations of improper or questionable expenses OCE made at the direction of DOC.

A. INFRASTRUCTURE AND SECURITY

Killgore alleged that after he was hired as the Administrator of OCE, Deputy Director Mitch Morrow asked OCE to buy some security devices for DOC. When Killgore agreed, Morrow told Killgore that was a "test." After that, Killgore alleged OCE had a pattern of acceding to questionable spending requests from DOC.

B. SUPPLIES FOR DOC

Killgore also noted various requests from DOC to OCE for supplies for DOC's benefit. For example, Killgore alleged Deputy Director Mitch Morrow told Betty Bernt of OCE that OCE needed to "donate" large amounts of inmate uniforms to DOC. According to Killgore, Killgore refused and told Bernt to have Morrow call him about this, which Morrow never did.

Killgore also alleged that Morrow told Lisa Hall of OCE that he wanted OCE to buy two 42" TVs for the Director's Office. When Hall was asked about this she said that Morrow was in a meeting with her and several other people and he was talking about the procurement process that DOC must follow and that OCE is exempt from it. Hall said he gave the example of OCE could go and buy two 42" TV's from any store and DOC would not be able to do that.

C. DONATIONS AND GOODWILL GESTURES

The third category of allegations includes donations and goodwill gestures from OCE to DOC. According to Killgore, these donations and goodwill gestures were made to ensure the smooth running of OCE operations in DOC institutions. Examples of such expenditures include snacks during Corrections Officers Week for corrections officers that DOC asked OCE to pay for as a "goodwill gesture" towards DOC. Killgore was also concerned that OCE gave furniture to DOC at no cost, which allowed DOC to economically benefit without reporting the expenditure as part of DOC's budget.

¹¹ See Appendix A for examples

¹² See Appendix A for examples

Killgore was also concerned about a public relations video DOC asked OCE to fund. According to Killgore, the video cost some \$20,000. According to Oregon law, OCE spending must be related to developing, maintaining and implementing prison work programs. Killgore was bothered that the video was not directly related to OCE inmate work.

Killgore also told DOJ special agents that OCE paid for funeral expenses of a corrections officer who had been murdered while off duty. Killgore said that OCE paid for lodging for the victim's family, rental of the facility for the service, transportation for attendees and refreshments for the DOC Honor Guard. According to Killgore, these arrangements were made between Betty Bernt and Morrow. Killgore stated he knew nothing about OCE paying for these items until after the offer was extended to DOC. Killgore provided e-mail correspondence between Bernt and Morrow that supported his allegations. Killgore was concerned because these expenditures had nothing to do with maintaining, implementing, or developing prison work programs.

D. PERSONNEL COSTS

Killgore listed several personnel decisions made by DOC involving OCE which caused him concern. Killgore alleged OCE was asked to hire a correctional officer who had lost his corrections officer certification as a result of being convicted of the misdemeanor offenses of Driving Under Influence of Intoxicants and Resisting Arrest. According to Killgore, Deputy Director Morrow requested OCE hire this correctional officer and Killgore created a position for him in one of the laundry facilities. Killgore also alleged that Morrow wanted OCE to hire a correctional employee who had allegedly solicited a prostitute,¹³ a former DOC employee with an eye condition, another correctional officer who was arrested for Driving Under the Influence of Intoxicants and another who had been arrested for assaulting his own son.¹⁴

Killgore also alleged Morrow had met him for lunch and asked Killgore to create a position for Betty Bernt, who was Morrow's Executive Assistant at the time. Killgore said that as a result of Morrow's request OCE created a customer relations manager position for Bernt.

According to Killgore, the previous DOC Director, Max Williams, also asked OCE to hire specific people. For instance, Williams suggested OCE look at Bruce Potts, who had previously worked for Nike. Williams specifically told Killgore he was not looking for any favors for Potts, but felt he would be a good addition to OCE. Potts was hired for a temporary position in OCE. Approximately a year later, Potts applied for a full-time position, but was rejected by the hiring committee. Killgore said that he was later approached by Morrow and was told to hire Potts for a full-time position because the Director was tired of his wife talking to him about it. As a result, Killgore created a position for Potts within OCE.

¹³ Investigation revealed that this person was arrested for this offense but nothing appears on his criminal history; only that this incident was routed to DOC for a possible diversion.

¹⁴ All of these individuals were hired by OCE, but there are no documents to establish that the request was made by Morrow.

Killgore was also concerned about Deputy Director Morrow's involvement with OCE and the hiring of Morrow's son, Zak. Killgore spoke to Morrow suggesting he look at his son's application. Killgore stated he felt like he had no choice but to hire Morrow's son and pay his moving expenses because Morrow stated that he had the DOC Director Max Williams' backing. Killgore also alleged Morrow later communicated to OCE that he was not happy with his son's salary or the initial moving expenses. According to Killgore, OCE doubled Zak Morrow's moving expenses and increased his salary because of Morrow's complaints.

According to Killgore, OCE could not afford these personnel expenses. In order to cover the additional personnel costs OCE increased the amount of money it charged DOC for laundry services. Killgore indicated he didn't remember but it was someone at DOC's idea to raise the laundry costs to cover these additional personnel costs.

Killgore stated that the reason he felt he had to hire personnel and pay for expenditures for DOC was that he feared retaliation from Deputy Director Morrow. Killgore stated that Morrow had an "exit strategy" for people Morrow did not like which involved moving them to a position that would eventually be eliminated. Killgore stated that he feared for both his position, and his wife's, who was a corrections officer at DOC. Killgore also stated that Mitch Morrow ran the day-to-day operations of DOC from the Director's office.

IV. KILLGORE'S ACTIONS REGARDING THE QUESTIONABLE EXPENDITURES DURING HIS TIME AS THE OCE ADMINISTRATOR

Prior to bringing these allegations to DOJ, Killgore took some steps throughout the years to question some of the requests by DOC he thought were questionable. One such step was asking DOJ's General Counsel Division for legal opinions regarding whether OCE could legally make certain expenditures.

In 2002, Killgore asked DOJ to opine whether OCE could legally fund crime prevention programs—such as Head Start—in the local community. DOJ advised that OCE could not constitutionally, nor statutorily, fund such a program since such an activity would not be related to prison work programs in any way.

In 2005, Killgore sought DOJ advice on whether OCE could assist in the funding of a Children of Incarcerated Parents project for Oregon. DOJ advised that while support of such a program may be within the broad statutory authority of DOC, funding such a program was not within the Oregon Constitution or the statutory authority of OCE. This is because this program was not related to implementing, maintaining, or developing prison work programs. This program does not work directly with inmates but rather works with the children of inmates to help them better cope with their situation.

In addition to asking for such legal opinions, Killgore also met with the former Director of DOC Max Williams to voice his concerns. Killgore alleged that he met with Max Williams on January 20, 2012, and told Williams he was concerned that OCE was being used as "DOC's slush fund." (When Williams was interviewed by DOJ special agents, he said those were

Killgore's words and he may have parroted those back to Killgore.) Several days later Williams asked Killgore to meet with him and Morrow, who was at the time the Interim Director of DOC, to share these concerns with him. Killgore stated he hoped that when the new DOC Director came in that the improper expenditures would be stopped.

As a result of the meeting between Morrow and Killgore, on January 29, 2012, Morrow sent out an e-mail to DOC superintendents and DOC policy group outlining OCE's support and generosity to DOC. The e-mail also indicated that due to limited finances OCE's contributions/donations to DOC would be limited and there would be a formal process to make requests.

Another action Killgore took was to contract a business practice review of OCE. OCE has been under contract with PSU for years for such services as far back as 2005. Killgore met with Portland State University (PSU) in late 2011 and requested that they review OCE's business practices and make some recommendations. Killgore entered into a \$150,000 contract with PSU for this review, which included looking at OCE moving some of its operations to Oregon Youth Authority and potentially becoming a non-profit. Killgore felt that Morrow was supportive of the PSU contract and looking at options for OCE. In March of 2012, there are e-mail communications indicating that DOC was still supportive of the PSU contract.

Killgore indicated he met with the DOC Director Colette Peters on February 22, 2012, and brought to her his concerns about the DOC expenditures and his contract with PSU. He also suggested an audit of OCE. Killgore said that Peters was not interested in the PSU audit and felt that a Memorandum of Understanding and some changes in policies would correct the expenditure issues. Shortly after this meeting, Peters changed the organizational chart, moving OCE under DOC, instead of beside it as a quasi-state agency. In September of 2012, Killgore was sent an e-mail from Morrow informing Killgore that he and several other OCE executives would have their offices moved from the main OCE offices to the Dome building, where DOC central management is housed. Killgore felt that this was due to his concerns about OCE funds being misused and his contract with PSU.

V. INVESTIGATION SUMMARY

Initially, SA Shimanek and SA Persons requested and obtained consent to seize computers from Mitch Morrow, Robert Killgore and Betty Bernt. After review of the materials provided by Robert Killgore, investigators prepared Attorney General subpoenas for e-mails of the previously mentioned persons and former DOC Director Max Williams. The following individuals were interviewed by SA Shimanek and SA Persons:

- 1) Robert Killgore, (OCE Administrator) October 11, 2012
- 2) Lisa Hall, (Assistant Superintendent of Correctional Rehabilitation at Coffee Creek Correctional Facility. OCE employee currently on job rotation for DOC.) October 15, 2012
- 3) Betty Bernt, (Customer Relations Manager for OCE) October 15, 2012
- 4) Nick Armenakis, (Retired. Former OCE Deputy Administrator.) October 15, 2012
- 5) Max Williams, (Retired. Former Director of DOC.) October 18, 2012

- 6) Colette Peters, (Current Director of DOC) October 22 and 26, 2012
- 7) Mitch Morrow, (Current Deputy Director of DOC) October 22 and 26, 2012
- 8) Dave Caulley, (Retired. Former Contracts Manager of OCE.) October 30, 2012
- 9) Tami Dohrman, (Assistant Director General Services of DOC) November 5, 2012
- 10) Gary Kilmer, (Deputy Administrator of OCE, Business Operations) October 31, 2012
- 11) Laura Osborn, (Deputy Administrator of OCE) October 29, 2012
- 12) Neil Bryant, (Attorney at Law, former advisory council to OCE) October 23, 2012

VI. LEGAL ANALYSIS

A. CRIMES CONSIDERED

Based on Killgore's allegations, our investigation focused on determining whether any of the following crimes had been committed:

- Theft by Extortion
- Coercion
- Official Misconduct in the First Degree
- Official Misconduct in the Second Degree
- Bribe Giving and Bribe Receiving

Our analysis of each of these crimes follows.

B. THEFT BY EXTORTION AND COERCION

We first analyzed the crimes of Theft by Extortion and Coercion due to Killgore's allegations that he feared retaliation if he did not go along with various requests from DOC. Theft by Extortion is defined in ORS 164.075, which states:

A person commits theft by extortion when the person compels or induces another to deliver property to the person or to a third person by instilling in the other a fear that, if the property is not so delivered, the actor or a third person will in the future:

- (a) Cause physical injury to some person;
- (b) Cause damage to property;
- (c) Engage in other conduct constituting a crime;
- (d) Accuse some person of a crime or cause criminal charges to be instituted against the person;
- (e) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule;
- (f) Cause or continue a strike, boycott or other collective action injurious to some persons business, except that such conduct is not considered extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act;
- (g) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense;

- (h) Use or abuse the position as a public servant by performing some act within or related to official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
- (i) Inflict any other harm that would not benefit the actor.
- (2) Theft by extortion is a Class B felony.

The crime of Coercion is set out in ORS 163.275, which states:

A person commits the crime of coercion when the person compels or induces another person to engage in conduct from which the other person has a legal right to abstain, or to abstain from engaging in conduct in which the other person has a legal right to engage, by means of instilling in the other person a fear that, if the other person refrains from the conduct compelled or induced or engages in conduct contrary to the compulsion or inducement, the actor or another will:

- (a) Unlawfully cause physical injury to some person;
 - (b) Unlawfully cause damage to property;
 - (c) Engage in conduct constituting a crime;
 - (d) Falsely accuse some person of a crime or cause criminal charges to be instituted against the person;
 - (e) Cause or continue a strike, boycott or other collective action injurious to some persons business, except that such a threat is not deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act;
 - (f) Testify falsely or provide false information or withhold testimony or information with respect to another's legal claim or defense; or
 - (g) Unlawfully use or abuse the person's position as a public servant by performing some act within or related to official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.
- (2) Coercion is a Class C felony.

Our investigation did not reveal the types of specific threats or coercive acts from DOC towards OCE which are required for these two offenses. Killgore could not articulate one example or instance of any threats by a DOC administrator to him or anyone else. We did not find any instance of anyone at OCE being told that if OCE did not pay for the requested expenditures that something detrimental would happen to anyone at OCE or towards OCE itself.

We also were unable to corroborate Killgore's fear of retaliation from DOC officials if he refused DOC requests. For instance, Killgore believed he and other OCE managers were moved from the main OCE offices to the Dome building of DOC as retaliation for raising concerns about OCE funds being misused. However we were told by Director Peters and Deputy Director Morrow that this move was made in order to prevent the disconnection they felt was occurring with members of OCE. We were also unable to corroborate Killgore's allegation that Deputy Director Morrow had an "exit plan" for people whom Morrow did not like.

The absence of any form of a threat or coercion eliminated the crimes of Theft by Extortion, or Coercion.

C. OFFICIAL MISCONDUCT IN THE FIRST DEGREE

We next focused on Official Misconduct under ORS 162.405 and 162.415. For reasons that follow, we have determined there is insufficient evidence to prove these crimes.

Official Misconduct in the First Degree is defined by ORS 162.415:

- (1) A public servant commits the crime of official misconduct in the first degree if with intent to obtain a benefit or harm another:
 - (a) The public servant knowingly fails to perform a duty imposed upon the public servant by law or one clearly inherent in the nature of the office; or
 - (b) The public servant knowingly performs an act constituting an unauthorized exercise in official duties.
- (2) Official misconduct in the first degree is a Class A misdemeanor.

The Oregon Supreme Court has described the crime of Official Misconduct in the First Degree under ORS 162.415(1) (b)¹⁵ as consisting of the following elements:

- (1) The defendant must be a "public servant." (2) He or she must knowingly perform an act. (3) The act must be performed "in" his or her official duties; that is to say, *in the defendant's official capacity, exercising the powers or opportunities available by virtue of his or her official position*. (4) The act must be an unauthorized exercise of his official capacity, power, or opportunity. (5) The act must be done "with intent to obtain a benefit or to harm another.

State v. Florea, 296 Or. 500, 503-4, 677 P2d 698 (1984) (emphasis added).¹⁶ These five elements are required for a prosecution under ORS 162.415(1) (b). We applied the law relating to Official Misconduct in the First Degree to each of the four types of transactions and determined there is no Official Misconduct in the First Degree in this case.

1. INFRASTRUCTURE AND SECURITY

We cannot prove any person involved with this case committed Official Misconduct in the First Degree under ORS 162.415(1) (b) regarding the expenditures for infrastructure and security for two reasons. First, we cannot prove any person knowingly performed an act which constituted an unauthorized exercise of their official capacity, power, or opportunity. In fact, we determined OCE's expenditures to be lawful because these devices were needed due to the increased security needed for the inmate work program at the various DOC institutions. Thus, OCE's infrastructure and security expenditures were meant to develop and maintain the OCE programs at the DOC institutions as required by Article 1, Section 41 of the Oregon Constitution.

¹⁵ Analysis of ORS 162.415(1) (a) is unnecessary because our investigation did not reveal any evidence of a failure to perform a duty imposed on a public servant in this case.

Second, we did not find evidence that the expenditures in this category were made with the intent to obtain a benefit or harm another. Instead, our investigation showed the actions in question were done with the intent to benefit DOC or OCE rather than the requestor or another individual.

It is important to note we were not able to corroborate Killgore's allegation of Morrow's "test" of Killgore when Killgore was first hired. Likewise, we were unable to identify any one person within DOC who was responsible for all the expenditures in this category as Killgore alleged. Rather, we found that various lower level DOC managers and personnel have ordered or requested that OCE pay for various items throughout the years. By the time the DOC requests came to Killgore's desk for approval, OCE had usually already paid for the item as part of its routine practice.

2. SUPPLIES FOR DOC

We were unable to corroborate Killgore's allegation that Deputy Director Morrow told OCE to "donate" large amounts of inmate uniforms to DOC. We also determined Killgore's allegation of Lisa Hall of OCE at the time, wanting OCE to buy TV's for the Director's office was not factually true.

3. DONATIONS AND GOODWILL GESTURES

We cannot prove any person involved with this case committed Official Misconduct in the First Degree under ORS 162.415(1) (b) regarding OCE's donations and goodwill gestures to DOC because OCE has broad constitutional and statutory authority to make goodwill gestures and donations if they are intended to implement, maintain or develop OCE programs. In addition, we were not able to find any prohibition on DOC receiving such goodwill gestures or donations.

That said, our investigation revealed a culture within DOC of requesting OCE to pay for items that have limited, or no, direct benefit to OCE as a business enterprise. Deputy Director Morrow and others told us OCE must make gestures of goodwill to DOC because the Director's Office cannot make the institutions that comprise DOC cooperate with OCE. In other words, they believe OCE would fail without the cooperation of the DOC institutions which house OCE's businesses and provide OCE labor. No one we interviewed was able to satisfactorily explain why the DOC Director could not simply order the institutions to cooperate with OCE and expect that such cooperation would be forthcoming.

4. PERSONNEL COSTS

We cannot prove any person involved with this case committed Official Misconduct in the First Degree under ORS 162.415(1) (b) regarding OCE's added personnel costs because OCE has broad authority to create positions and hire employees. In addition, Robert Killgore's allegation of DOC increasing its laundry contract to OCE in order to cover the additional personnel costs is unsubstantiated. E-mails reviewed show that OCE needed to raise the laundry costs due to inflation and the costs associated with running the laundry (fuel for trucks picking

up laundry, electricity rates, maintenance on laundry facilities and machines) and that there had not been an increase for years.

During the investigation it became clear that Deputy Director Mitch Morrow told Killgore to "take a look at" his son Zak Morrow for a job position and also made follow up calls to make sure that his son was paid more than typical moving expenses when he had to relocate. We scrutinized Deputy Director Morrow's conduct. While we believe a reasonable person would find Morrow had some improper influence in his son being hired, his actions do not rise to the level of Official Misconduct in the First Degree. We determined that Zak Morrow had applied to OCE prior to Mitch Morrow contacting Killgore about him. Deputy Director Morrow's conduct was to highlight and point out the fact that his son was an applicant. Furthermore, Zak Morrow applied for a position with OCE, not DOC. OCE has their own personnel department and their own set of hiring practices and criteria. There is no evidence Deputy Director Morrow called or attempted to directly influence the personnel department of OCE other than telling Killgore his son had applied and asking Killgore to take a look at him. We believe it was improper for Deputy Director Morrow to recommend his son for employment since Deputy Director Morrow was in a position of power over OCE and Killgore at the time; however, Deputy Director Morrow's actions do not constitute a crime.

D. OFFICIAL MISCONDUCT IN THE SECOND DEGREE

We also analyzed the facts in light of Official Misconduct in the Second Degree, which is defined in ORS 162.405:

- (1) A public servant commits the crime of official misconduct in the second degree if the person knowingly violates any statute relating to the office of the person.
- (2) Official misconduct in the second degree is a Class C misdemeanor.

Official Misconduct in the Second Degree is violated when a public servant knowingly violates any statute relating to the office of the person. There is no case law regarding Official Misconduct in the Second Degree. We analyzed the four categories in terms of whether these expenditures were used to implement, maintain, and develop prison work programs.

1. INFRASTRUCTURE AND SECURITY

As previously stated, we determined OCE's infrastructure and security expenditures were lawful because they were really meant to develop and maintain the OCE programs at the DOC institutions. These devices were needed due to the increased security needed for the inmate work program at the various DOC institutions.

2. SUPPLIES FOR DOC

We determined that OCE's supply expenditures to be lawful because they arguably develop, maintain and implement OCE programs at DOC institutions by making it easier to maintain the work programs at DOC institutions or because they are part of a marketing program.

for OCE good and services. For example, we determined the OCE furniture at the Dome Building was part of OCE's marketing program in that DOC officials would give credit to OCE in the construction of the furniture to visitors at the Director's Office.

3. DONATIONS AND GOODWILL GESTURES

Article 1, Section 41 of the Oregon Constitution gives OCE broad latitude to implement, maintain and develop its prison work program. This broad latitude generally extends to OCE's donations and goodwill gestures to DOC.

As we have previously stated, however, our investigation revealed a culture within DOC of requesting OCE to pay for items that have limited, or no, direct benefit to OCE as a business enterprise. The justification given for this is that OCE's donations and goodwill gestures were necessary to ensure DOC's cooperation with OCE. As stated previously, no one we interviewed was able to satisfactorily explain why the DOC Director could not simply order the institutions to cooperate with OCE and expect that such cooperation would be forthcoming.

We are particularly concerned in this regard about OCE's donation to Officer Herron's funeral. It was clear from our interviews with DOC personnel, notably Deputy Director Morrow, that DOC and OCE officials believed covering the funeral expenses was outside the permissible uses of OCE funds. We are very concerned that DOC and OCE officials authorized the expenditures despite their belief the expenditures were not permissible.

That having been said, there is an argument that OCE's contributions to the funeral generated tremendous goodwill in the institution in which Officer Herron had worked and in the community, thus helping OCE to maintain its program in that institution while at the same time possibly opening doors to new sales in the community. Viewed in that light, the funeral expenditures are authorized under Article 1, Section 41.

4. PERSONNEL COSTS

We analyzed the nepotism statutes to determine if anyone associated with the hiring of Zak Morrow had violated a statute related to their office for the purposes of Official Misconduct in the Second Degree. It should be noted that the nepotism statutes are not criminal offenses, but ethical rules.

According to ORS 244.175(4), "relative" mean....any children of the public official. ORS 244.177(1) (a) states that:

a public official may not appoint, employ or promote a relative or member of the household to or discharge, fire or demote a relative or member of the household from, a position with the public body that the public official serves or over which the public official exercises jurisdiction or control, unless the public official complies with the conflict of interest requirement of this chapter.

ORS 244.177(1) (b) states that:

a public official may not participate as a public official in any interview, discussion or debate regarding the appointment, employment or promotion of a relative ****As used in this paragraph, participate does not include serving as a reference, providing a recommendation or performing other ministerial acts that are part of the normal job functions of the public official.

There is no case law regarding this statute and statute itself does not define "employ."

Our investigation revealed Deputy Director Morrow did not expressly order his son to be hired. Thus, while Deputy Director Morrow does have, *de facto*, considerable influence over OCE, he did not "appoint, employ or promote" for the purposes of ORS 244.177(1) (a). In addition, we believe Morrow did not "participate" in a discussion regarding his son's employment for the purposes of ORS 244.177(1)(b). Instead, we believe Morrow provided an informal recommendation, which is allowable under ORS 244.177(1)(b). Consequently, Morrow did not commit violate the nepotism statutes.

E. BRIBE GIVING AND BRIBE RECEIVING

According to ORS 162.015 (1), a person commits the crime of Bribe Giving if the person offers, confers or agrees to confer any pecuniary benefit¹⁷ upon a public servant with the intent to influence the vote, opinion, judgment, action, decision or exercise of discretion of the public servant¹⁸ in an official capacity and (2) Bribe giving is a Class C Felony. "The elements of the offense of bribe giving are (1) offering, conferring, or agreeing to confer any pecuniary benefit; (2) on a public servant; (3) with an intent to influence the public servant's vote, opinion, judgment, action, decision or exercise of discretion in an official capacity." *State v. Lynch*, 230 Or App 23 at 27, 28, 213 P3d 853, *rev den* 347 Or (2009)¹⁹ In regard to case law for Bribe Giving, the mental state of this crime only requires the wrongful intent on the part of the offeror as opposed to both the offeror and the offeree having the requisite mental states.²⁰

¹⁷ ORS 162.005 states: "Pecuniary benefit" means gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary, in the form of money, property, commercial interests or economic gain, but does not include a political campaign contribution reported in accordance with ORS chapter 260 (2)(a)."

¹⁸ "Public servant" means a public official as defined in ORS 244.020 (14); any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body as defined in ORS 174.109 as an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for his services.

¹⁹ In *State v. Lynch*, 230 Or App 23, 213 P3d 853, *rev den* 347 Or ____ (2009), the defendant was convicted of bribe giving. On appeal, he challenged his conviction on the grounds that the state failed to prove venue and failed to prove intent. The court affirmed the convictions. The case does not provide much analysis of the statute, but has a nice summary of the elements.

²⁰ The Court of Appeals in *State v. Martin*, 95 Or App 170, 769 P2d 203 (1989) affirmed the defendant's conviction for bribe giving, but contains little analysis. The case briefly discusses the mental state for bribe giving..."the mens rea requirement in the bribe giving section is framed in terms of 'with the intent.' The thrust of this requirement is to avoid the necessity of proving a 'meeting of the minds' crucial to an agreement or understanding. The subjective wrongful intent of the bribe offeror is the gravamen of bribe giving." *Id.* at 175 n 1.

According to ORS 162.025 (1), a person commits the crime of Bribe Receiving if a public servant (a) solicits any pecuniary benefit with the intent that the vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced or (b) accepts or agrees to accept any pecuniary benefit upon an agreement or understanding that the vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced. There is no case law on Bribe Receiving.

None of the four categories of questioned expenditures were conducted to offer or solicit with the intent to influence the public servant's vote, opinion, judgment, action, decision or exercise of discretion. Rather the transactions were for the benefit of the institution of DOC itself. There were no gains on any personal level for any of these individuals. There was no offering or receiving of any pecuniary benefit of any kind towards OCE. Therefore, we determined these statutes do not apply to any of these transactions or expenditures at issue in this investigation.

VII. CONCERNS RAISED BY THE INVESTIGATION

Although we have determined that there is insufficient evidence of criminal conduct on the part of DOC employees, this investigation raises several concerns about the relationship between DOC and OCE:

- As noted, income generated by OCE can be used only to "implement, maintain and develop" prison work programs, and the OCE administrator has broad discretion to carry out its purpose and mission. The lack of clear statutory or constitutional mandate regarding the meaning of these directives has led to repeated requests by DOC to OCE for questionable items—which requests have been granted—especially as they pertain to donations and goodwill.
- There is a distinct lack of oversight over the OCE Administrator, who regularly enters into contracts with virtually no accountability.
- There exists a culture within DOC that seems to depend upon inappropriate "gestures of goodwill" between DOC and OCE because the Director's Office in DOC cannot make the institutions that comprise DOC cooperate with OCE. Cooperation between OCE and the DOC institutions that provide the workforce for OCE must be forthcoming through clear management oversight without reliance on these gestures.

We strongly recommend that our concerns about the relationship between these two critical state entities be addressed. However, we recognize that dealing with these concerns exceeds the scope of our investigation and we have referred these issues to the Chief Operating Officer for his consideration.

APPENDIX A: SUMMARY OF EXPENDITURES REQUESTED BY DOC FROM OCE

The following summary is not an exhaustive list of all of the allegations of improper expenditures, but is intended to show the approval process between OCE and DOC.

INFRASTRUCTURE/SECURITY

Security Cameras, Monitors and Other Systems at Two Rivers Correctional Institution (TRCI) \$7341.98

- DOC requested the purchase of this security system through an "Inside Oregon Enterprises-Request for Capital Expenditure or Expendable Property" form dated May 17, 2007.
- Laura Osborn and Robert Killgore of OCE approve the request.
- OCE paid \$7341.98 for this system, which was half of the total costs.

Cameras at Oregon State Correctional Institution (OSCI) \$15,000

- Anton Kowanda of DOC requested OCE to purchase security cameras at Oregon State Correctional Institution (OSCI) workforce areas Nick Armenakis of OCE approved this request on July 24, 2008 for \$15,000.
- The total cost was \$30,000 and DOC paid the other \$15,000 from the Prison Rape Elimination ACT (PREA) funds. OCE paid the other half of \$15,000.

Heart Beat Monitor-TRCI \$15,740.25

- DOC requested that OCE split the cost of a MicroSearch Human Presence machine and miscellaneous equipment for TRCI.
- The request was approved by Laura Osborn and Robert Killgore.
- On October 6, 2008, OCE paid \$15,740.25, payable to Ensco Inc.

Heartbeat Monitor/OSCI \$15,000

- Lisa Hall requested that OCE and DOC split the cost of a heartbeat monitor for OSCI. An itemized price quote from Ensco dated December 8, 2010, was sent to DOC.
- Laura Osborn and Robert Killgore of OCE both approved the expenditure.
- OCE paid \$15,000 on January 31, 2011, for MicroSearch G3 at the OSCI inspection gate which was half of the costs.

Eastern Oregon Correctional Institution (EOCI) Gate Remodel \$29,622.23

- A manager of OCE wrote an e-mail dated May 16, 2011, regarding concerns the staff had at Eastern Oregon Correctional Institution (EOCI) with the east gate and the time it takes officers to manually open gates for OCE business.
- Killgore provided numerous invoices and receipts for multiple vendors from July through December, 2011. All of the invoices are in OCE's name, for EOCI and some list the garment factory.
- There is no indication that DOC paid for any part of this or requested this purchase.

SUPPLIES FOR DOC

Conference Table/Chairs for the Dome Building \$16,673.00

- Mitch Morrow requested various furniture for the Dome Building on June 6, 2006. An e-mail from the Public Affairs Manager/Central Support DOC to Mitch Morrow stated that Max Williams, the Director of DOC, let Colette Peters, who was in a position with DOC public relations at the time of this request, know that he wanted to see Room 108 done, get it painted and get furniture through OCE. The last sentence is "I'm asking you, since it will be the Director's Office who pays, of course!"
- E-mail from Killgore to Morrow and Betty Bernt, dated November 30, 2006, states "Do you have the funds to buy the materials and we build it?" Bernt, while employed at DOC, orders chairs, tables and dry erase boards.
- OCE Invoice shows furniture was a "promotional item" and there was no charge to DOC. The furniture was valued \$16,673.

Discount on Bunks/TRCI \$27,463.15

- A DOC employee placed two orders; July 5, 2011, for 50 bunks/ladders and October 26, 2011, for 15 bunks/ladders.
- The total for the July 5, 2011, order was \$44,750, but the invoice states that the raw materials were already paid for by DOC and the rest were listed as promotional items and so there was no charge by OCE.
- Attempts to verify the raw materials were purchased by DOC were made, but we were told without knowing when the materials were purchased they would not be traceable. Material is bought in large quantities and when market price is low.

DONATIONS AND GOODWILL GESTURES

Focus on Accountability - Print Job \$9779.31

- DOC Public Affairs requested a print job for 2000 Focus on Accountability reports to be printed on September 6, 2007.
- This was done for no charge to DOC, coded promotional by OCE employees.

OSCI 50 Year Anniversary - Print Job \$5610.73

- A DOC Superintendent made the request to OCE for printing 500 OSCI fifty year anniversary books on April 2, 2009.
- Lisa Hall of OCE noted this as a promotional job.
- The cost of the book for OCE was \$5610.73, but DOC paid nothing.

Boy Scouts of America Banquet \$5000

- Max Williams requested that OCE pay for the banquet table at the Boy Scouts dinner honoring Governor Ted Kulongoski.

- Robert Killgore approved this.
- This sponsorship cost OCE \$5000.
- However, OCE hoped that the Boy Scouts would also become future customers. Killgore said for several years OCE donated to the Boy Scouts, but the Boy Scouts never ordered any goods/services.
- Special Agent Kim Hyde contacted the Cascade Pacific Council of Boy Scouts to see if OCE or Williams gained anything from sponsoring the table and was told that dinner was provided and OCE was recognized as a contributor to the event. Williams did not sit at the OCE table and did not receive anything besides the dinner itself.
- OCE continued for years to do discounted or free print jobs for Boy Scouts, which was requested directly by the Boy Scouts.

DOC Shield/Superintendent's Office OSCI \$1960.09

- This was a DOC request for a bronze shield for the Superintendent's Office.
- Laura Osborn of OCE writes in an email that she hopes the DOC Superintendent understands the "value" of what they are providing. She adds that she hopes it buys good will for Lisa Hall, who worked at OSCI as an OCE employee.
- According to an OCE invoice they donated \$1960.69 and OSCI paid for \$500. The invoice is dated December 6, 2009. This is the large shield on the sign at the entrance to OSCI.

Boy Scouts of America Banquet \$5000

- There is a DOC request made by Betty Bernt for OCE on September 8, 2010 for sponsorship of table at Distinguished Citizen Dinner for \$5000.
- Robert Killgore approved this expenditure.
- OCE also donated mailing and print services (over \$3000) to the Boy Scouts from September to December.

Military Coins \$2882.78

- A DOC employee and representative of Homes for Our Troops appear to have signed request for helping to purchase military coins.
- OCE's Request for Donation listed the expense as "Homes for Our Troops" and the contact person was a DOC employee. The organization is a 501(c) (3) and assists severely injured servicemen and women in housing to fit their needs.
- The coins made were worth \$2882.78.

Computer Kiosks for DOC Central Distribution Center \$1344 & \$2496

- Two donation requests were made by a representative of the Governor's Re-Entry Council for the kiosks to OCE. The description given for the donation request was that the council works on identifying and minimizing barriers offenders have when transitioning out of the correctional system.
- The request was signed by Killgore on November 15, 2010.
- The items are listed as charitable donations and the total for 20 computer kiosks was \$3840

Officer Herron Funeral Expenses \$2484.63

Funeral expenses for a slain correction officer from EOCl, Buddy Herron.

- Shuttle for family \$ 132.97
- Honor Guard expenses \$ 302.81
- Rental of facility \$ 420.00
- Lodging for family \$ 1673.85
- An e-mail dated November 29, 2011, from Betty Bernt, an employee of DOC, to EOCl Executive Assistant to the Assistant Superintendent of EOCl, and Mitch Morrow was CC'd regarding OCE paying for rooms.
- November 30, 2011, Bernt e-mails Killgore and tells him they are paying for hotel rooms and funeral expenses. The last thing she writes is "Mitch says thanks."
- A December 1, 2011, e-mail from Bernt to Morrow appears to be a condolence message, but also an invitation to pay for costs of things that may arise. Above that paragraph is a line that says; "How's this? Short, sweet and to the point. Does it need anything else?" An e-mail back from Morrow states, "Perfect." The condolence e-mail is sent out by Bernt to the superintendent of EOCl and several people are CC'd. The subject line is "OCE Assistance."
- Bernt also sends an e-mail to Morrow asking if there is something they can do to give to the family a plaque or commemorative badge and Morrow declines.
- A December 12, 2011, e-mail from Morrow to Bernt asks, "Any more crap about the money OCE spent on the funeral stuff? Maybe I don't want to know." Bernt writes back "No more crap on the money. I'm trying not to bring it up."

Approved by:



Darin E. Tweedt
Chief Counsel